THE TRADER'S GUIDE

TO

THE LAW AFFECTING THE SALE OF GOODS

BY

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SECOND EDITION

LONDON

EFFINGHAM WILSON

ROYAL EXCHANGE

1901

THE ABERDEEN UNIVERSITY PRESS LIMITED.

PREFACE.

THIS Guide contains the text (with slight alterations) of the Sale of Goods Act, 1893; and the substance of the Factor's Act, 1889. Mention has also been made of the old Statutes 31 Eliz. c. 12, and 2 & 3 Phil. & Mary c. 7, in reference to the sale of horses in open market. The latest decisions on the subject of the Sale of Goods are also included.

The Author has, in his treatment of the information the little work contains, endeavoured to state the law in a popular manner, and has avoided technicalities as far as possible.

LAWRENCE DUCKWORTH.

MIDDLE TEMPLE, *May*, 1900.

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INTRODUCTION.

THE law relating to the Sale of Goods has been codified by the Sale of Goods Act, 1893, and according to its learned draughtsman (Mr. M. D. Chalmers), the object of this statute is "to lay down rules when the parties have either formed no intention, or failed to express it". Moreover, the Act seeks to set out in one consistent whole the entire mass of law relating to its subject matter; that is to say, it endeavours to combine common law (judicial decisions) and statute law. But though the law has been codified by this enactment, yet the common law, as laid down by the judges, loses none of its force.

The primary object which the draughtsman had in view in framing the Sale of Goods Act, 1893, was to substantially reproduce, in statutory shape, the principles of the common law, and at the same

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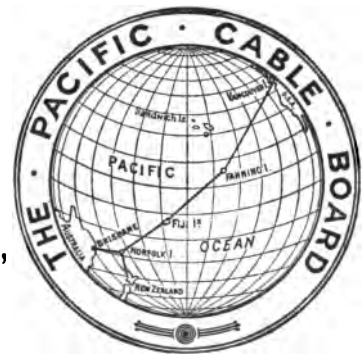

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buyer the contract is called a sale ; but where the transfer of the property in the goods is to take place at a future time, or subject to some condition thereafter to be fulfilled, the contract is called an *agreement to sell.*

An agreement to sell becomes a sale when the time elapses, or the conditions are fulfilled, subject to which the property in the goods is to be transferred.

A " contract of sale " includes an agreement to sell as well as a sale, and the term " sale " includes a bargain and sale as well as a sale and delivery, and the expression " property " denotes the general property in goods, and not merely a special property. A man cannot purchase his own goods ; however, one co-proprietor may sell his interest in the goods to another, and there are certain other exceptions, notably, in the case of a bankrupt, who may buy back his own goods from the trustee, but any person occupying a fiduciary position cannot, by the general policy of the law, become a purchaser.

When a person contracts to sell goods, he, by the contract, divests himself of all proprietary rights in them, and the goods become the property of the buyer.

An agreement to sell is a contract pure and simple, certain conditions having to be fulfilled before it is executed, but a sale, that is, an executed contract of sale, is a sale plus a conveyance. If a person buys goods, and makes default, the price may be sued for ; on the other hand, if it is an

agreement to buy, the seller's remedy is an action for unliquidated damages. If an agreement to sell is broken by the seller, the buyer's remedy is only a personal one. As a general rule, where there is an agreement for sale and the goods are destroyed, the loss falls on the seller, but if there has been a sale, it is *vice versâ*, notwithstanding the fact that the buyer has never had them in his control.

A quasi-contract of sale is a transaction to which apart from the will of the parties, the law adds consequences, analogous to those which result from a sale.

Capacity to Contract.—Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property, but where necessaries are sold and delivered to an infant (or minor), or to a person who by reason of mental incapacity, or drunkenness, is incompetent to contract, he must pay a reasonable price for them. "Necessaries" within the meaning of Section 2 of the Sale of Goods Act, 1893, signify goods suitable to the condition in life of such infant (or minor) or other person, and to his actual requirements at the time of sale and delivery.

What is meant by capacity is this: that a person has power to bind himself; authority, on the other hand, signifies power to bind another.

Infants, married women, lunatics, drunkards, etc., cannot contract. However, by the Married Women Property Act, 1882, a married woman can contract in her own name, and bind herself to the extent of her separate estate; and where she

carries on a trade separate to the trade of her husband, she can be made a bankrupt. Assuming that a husband allows his wife to carry on a business for her own separate use and benefit, it becomes her separate property as between him and her—not between the creditors, but between him and her—and makes the property her own separate estate, and therefore the stock-in-trade and capital are also part of the wife's separate estate. The fact that the business was one which the married woman had prior to marriage, or one which she had established after their marriage, with the consent of her husband, is quite immaterial, and she can sue and be sued, in all respects as if she were a single woman, but only to the extent of her separate estate "without restraint on anticipation". A married woman's liability on a contract of sale rests on the question whether she had separate property with regard to which she could reasonably be deemed to have contracted, and the person suing her must prove that she had separate estate *at the time the goods were purchased.* Moreover, where the husband allows his wife to pledge his credit, he is bound by her acts, as she is agent for him, but the wife's implied authority to pledge her husband's credit is now restricted to "necessaries".

A lunatic must be shown to be quite *incompetent, at the time of contracting*, to understand what he was doing. However, he is liable for necessaries. Drunkenness is an excuse for non-payment for goods supplied, when it can be shown that at the time they were ordered the person giving the order

was so drunk that he did not appreciate what he was doing. A drunken person is liable for necessaries ordered when drunk.

In reference to infants, it is provided by Section 1 of the Infants Relief Act, 1874, that "all contracts . . . for goods supplied, other than contracts for necessaries, and all accounts stated with infants shall be absolutely void". If necessaries are supplied to an infant child *without his father's authority* the latter is not liable, nor is the mother, notwithstanding the fact that she has separate estate. The master of a ship is also liable for necessaries supplied to the ship.

Formalities of the Contract.—Subject to the provisions of the Sale of Goods Act, 1893, and of any statute in that behalf, a contract of sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties, but nothing shall affect the law relating to Corporations who can only contract under seal, saving in transactions of minor importance or of urgent necessity.

A written offer to sell goods may be accepted by word of mouth, or *vice versâ*.

In forming a contract for the sale of goods there must (as has been pointed out above), be *two parties* who must *mutually agree*, the one to sell and the other to buy the *same* thing for a *price*. A proposal can be withdrawn at any time *before* acceptance, and an acceptance of the offer must not vary in the slightest degree. Where a person makes an

offer to another person, and it is understood between them that the offer is to be kept open for a specified time; unless some valuable consideration is given, such an offer, under these circumstances will not be binding, and he will be entitled to withdraw his offer as soon as he thinks fit; but in order to make an offer binding, that is to say, in order to make a *promise* binding, the one who promises must at the time receive some benefit, or avoid some damage in consideration of the promise.

A contract for the sale of any goods of the value of £10 or upwards will not be enforceable by action unless the buyer accepts part of the goods so sold, and shall actually receive the same, or gives something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged, or his agent, in that behalf, and this applies to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing of it, or rendering the same fit for delivery. There is an acceptance of goods within the meaning of sub-section (3) of Section 4 of the Sale of Goods Act, 1893, when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale whether there be an acceptance in performance of the contract

or not. But the provisions of Section 4 of the Sale of Goods Act, 1893, do not apply to Scotland.

If A agrees with B *verbally* to purchase certain cabinets, and says, "of course you know I overpaid you £1 on that previous transaction between us, and it is now agreed upon to consider it part payment of the present transaction"; and B replies "yes": this does *not* constitute part payment—within sub-section (1) of Section 4 of the Sale of Goods Act, 1893. However, if B agrees verbally to purchase, by sample, so many tons of hay, to be delivered at B's wharf, where he inspects and samples it, but rejects it on account of its not being in his opinion equal to the original sample, this will constitute a sufficient acceptance within the meaning of the sub-section of the statute just mentioned.

A person will be entitled to refuse to complete the contract for the sale of goods, when there has been a mistake on the part of one or both of the parties in reference to the subject matter of the contract, or the price, and when there has been a *mistake* with regard to the identity of one of the parties, and the identity constitutes an essential element, and has induced the other party to assent to the sale. This is so, even when the contract has been completed.

Fraud, of course, will always be a complete answer to the refusal to complete such a contract, and where the contract has been completed it may be rescinded on this ground. But the fraud must

be proved The maxim of the English law is, *fraus omnia vitiat* (fraud vitiates all things).

In order for a sale to be a valid sale the thing or things sold must be in existence. However, there may be an *agreement to sell* (see p. 4) a thing which is not yet in existence, or to which something remains to be done. (See next paragraph.)

CHAPTER II.

Subject-matter of the Contract of Sale—Contract for Sale of specific goods—The price—What a deposit in regard to Sale means—Agreement to sell goods on terms—Conditions and Warranties—Representations made during Contract—Where Contract subject to any condition in England or Ireland—In Scotland—Where person wishes to waive stipulation—In what cases there is an implied Contract of Sale—Contract of Sale by Description—What only necessary for buyer to show when seller warrants—Contract for the Sale of Goods by description—When no implied warranty as to quality or fitness of particular goods—Bargain and sale of specific goods—No implied warranty in English law as to quality of goods—Seller therefore not liable for breach of implied warranty.

Subject-matter of Contract.—The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract of sale, and which in the Sale of Goods Act, 1893, are called "future goods". Again, there may be a contract for the sale of goods, the acquisition of which, by the seller, depends upon a contingency which may or may not happen. Furthermore, where, by a contract of sale, the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods. A man cannot assign what has no existence.

Where there is a contract for the sale of specific goods, and the goods, without the knowledge of the seller, have perished at the time when the contract is made, the contract is void. But this has application only to specific goods. Where there is an agreement to sell *specific* goods, and the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is thereby avoided. "The rule applies to specifically described goods, whether in existence at the time the contract was made or not." (See *post.*)

The Price.—The price in a contract of sale may be fixed by the contract, or may be left to be fixed in manner thereby agreed, or may be determined by the course of dealing between the parties; and *where the price is not determined*, the buyer must pay a reasonable price. What is a reasonable price is a question of fact, dependent on the circumstances of each particular case.

A deposit signifies that part of the price, prepaid by way of security, handed over at the time the contract is entered into; and the deposit is forfeited if the sale goes off through the fault of the buyer. "The deposit serves two purposes—if the purchase is carried out it goes against the purchase money; but its primary purpose is this, it is a guarantee that the purchaser means business."

Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party, and such third party cannot, or does not make such valuation, the

agreement is avoided ; provided, that if the goods or any part of them have been delivered to, and appropriated by, the buyer, he must pay a reasonable price for them. Moreover, where such party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain an action in damages against the party in fault.

Conditions and Warranties.—Unless a different intention appears from the terms of the contract, stipulations as to time of payment are to be deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract. In a contract of sale the term "month" generally means calendar month.

Representations made during a contract of sale may be a mere expression of opinion, or the representation may amount to a warranty, or may constitute part of the description of the thing sold, or it may be a false and fraudulent representation, and in this last case the contract may be avoided, according to the rule *fraus omnia vitiat* (explained *ante*), or the representation may create an *estoppel* (*i.e.*, a conclusive admission, which cannot be denied or questioned).

In England or Ireland, where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of such condition as a breach of warranty, *and not as a ground for treating*

the contract as repudiated. Whether a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages, but not a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract; and where a contract of sale is not severable, and the buyer has accepted the goods, or part of them, or where the contract is for specific goods, the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term in the contract express or implied to that effect.

In Scotland, failure by the seller to perform any material part of a contract of sale is a breach of contract, which entitles the buyer either within a reasonable time after delivery to reject the goods and treat the contract as repudiated, or to retain the goods and treat the failure to perform such material part as a breach which may give rise to a claim to compensation or damages. And nothing in sub-section (2) of Section 11 of the Sale of Goods Act, 1893, will affect the case of any condition or warranty, fulfilment of which is excused by law, by reason of impossibility, or otherwise.

If a person wishes to waive a stipulation, which is for his own benefit he may always do so; and where such a condition is prevented from being fulfilled by one party, by the other, such condition is waived.

In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is (1) an implied condition on the part of the seller that, in the case of a sale, he has a right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass; (2) an implied warranty that the buyer shall have and enjoy quiet possession of the goods; and (3) an implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party not declared or known to the buyer before or at the time when the contract is made. It may here be incidentally mentioned, that in Scotland the implied warranty of freedom from encumbrance is clearly recognised.

When there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description; and if the sale be by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description. "If you contract to sell peas, you cannot oblige a party to take beans. If the description of the article is different in any respect, it is not the article bar-

gained for, and the other party is not bound to take it." But the bargain and sale of goods as being of a particular description does imply a contract that the article sold is of that description. The contract is for the sale of the subject absolutely, and not with reference to collateral circumstances. *If the contracting parties intend to provide for any particular state or condition of the goods, they should introduce an express stipulation to that effect.* And if the goods tendered answer to the description, the buyer must take the risk as to their quality and condition apart from either an express or implied warranty.

Whatever a party warrants, he is bound to make good to the letter of the warranty, whether the quality warranted be material or not; it is only necessary for the buyer to show that the article is not according to the warranty. But if an article is sold by description merely, and the buyer afterwards discovers a latent defect, he must go further, allege the knowledge, and shew that the description was false within the knowledge of the seller. Moreover, where there is an express warranty as to any single point, the law does not, beyond that, raise an implied warranty that the commodity sold shall also be merchantable. A party who makes a simple representation stands, therefore, in a very different position from a party who gives a warranty. A written instrument must, like all other instruments, be interpreted according to the intention of the parties, as, for instance, where the dealing is by a contract note, the article

delivered must agree with the terms of the note. The words "contract for the sale of goods by description," used in Section 13 of the Sale of Goods Act, 1893, have application to all cases where the buyer has not seen the goods, but relies solely on the description given by the seller. (This is the latest reported case on the subject.)

Taking into consideration the provisions of the Sale of Goods Act, 1893 (of which Sections 13 and 14 must be read together), and of any statute in that behalf, there is *no implied warranty or condition as to the quality or fitness for any particular class of goods supplied under a contract of sale, except as follows:* (1) where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, if, in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose; (2) where goods are bought by description from a seller who deals in goods of that description (whether he be manufacturer or not), there is an implied condition that the goods shall be of merchantable quality; but if the buyer has examined the goods, there will be no implied condition as regards defects which such examination

ought to have revealed; (3) an implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the *usage* of the trade; and (4) an express warranty or condition does not negative a warranty or condition implied by the Sale of Goods Act, 1893, unless inconsistent with it.

The bargain and sale of specific goods, by the English law, undoubtedly transfers all the property the seller has, where nothing further remains to be done according to the intent of the parties to pass it. But it is made a question, whether there is annexed by law to such a contract, which operates as a conveyance of the property, an implied agreement on the part of the seller that he has the ability to convey. With respect to executory contracts of purchase and sale, where the subject is unascertained, and is afterwards to be conveyed, it would probably be implied that both parties meant that a good title to that subject should be transferred, in the same manner as it would be implied under similar circumstances, that a merchantable article was to be supplied. Unless goods, which the party could enjoy as his own were delivered, the contract would not be performed. The purchaser could not be bound to accept if he discovered the defect of title before delivery, and if he did, and the goods were recovered from him, he would not be bound to pay, or having paid he would be entitled to recover back the price, as on a consideration which had failed. However, when there is a bargain and

sale of a specific ascertained article, which operates to transmit the property and nothing is said about title, the result of the older authorities is by the law of England, there is no warranty of title in the actual contract of sale, any more than there is of quality. Be this as it may, the older authorities are strong to shew that there is no such warranty implied by law from the mere sale. "In contracts of sale it is constantly understood that the seller undertakes that the commodity he sells is his own." At all times, however, the seller was liable if there was a warranty *in fact*. "Where one in possession of a personal chattel [*e.g.*, chair, horse, etc.] sells it, the bare affirming it to be his own amounts to a warranty." If a man sells goods as *his own*, and the title is deficient, he is liable to make good the loss. There is no implied warranty of title on the sale of goods (except in the cases given above), and that if there be no fraud, a seller is not liable for a bad title, unless there is an express warranty, or an equivalent to it, by declarations or conduct; and the question in each case, where there is no warranty in express terms, will be, whether there are such circumstances as to be equivalent to such a warranty. Usage of trade, if proved as a matter of fact, would of course be sufficient to raise an inference of such an engagement; and without proof of such usage the very nature of the trade may be enough to lead to the conclusion that the person carrying it on must be understood to engage that the purchaser shall enjoy that which he buys as against all persons.

It is quite clear according to English law that there is no implied warranty as to the *quality* of goods; yet if the goods are ordered of a tradesman in the way of his trade, for a particular purpose, he may be considered as engaging that the goods supplied are reasonably fit for that purpose. It cannot be doubted that if the articles are bought in a shop professedly carried on for the sale of goods that the shopkeeper must be considered as warranting that those who buy will have a good title to keep the goods bought. In such a case the seller sells "as his own," and that is what is equivalent to a warranty of title. The common law rule is, that there is no implied warranty from the mere contract of sale itself.

However, though there is no implied warranty of title, and therefore the seller would not be liable for a breach of it to unliquidated damages, yet the purchaser may recover back the purchase money, if it could be shown that it was the understanding of both parties that the bargain should be put an end to if the purchaser should not have a good title, and where consideration had been given; and in a case of this kind there would have been a failure of consideration. But if there is no implied warranty of title, some circumstances must be shown to enable the person suing to recover for money had and received.

CHAPTER III.

Doctrine of *caveat emptor* (let the buyer beware!)—Sale by Sample—Where there is an implied condition in Contract by Sample—Evidence always admissible to prove Custom—Effect of contract of Sale—Transfer of property as between Seller and Buyer—Contract for specific or ascertained Goods—Rules for ascertaining Intention of Parties—Contract made for Specific Thing in existence—When Seller may reserve to himself right of disposal of Specific Goods—Contract of Sale of unascertained Goods—When Goods remain at seller's risk—The Person who has to bear loss of Goods.

In reference to the doctrine of *caveat emptor* (let the buyer beware!), the modern cases go to show that there has been a distinct tendency to limit its operation. Goods sold for a particular purpose must be fit for that purpose, that is to say, the articles offered or delivered must answer the purpose for which they were bought, and where the article or commodity does not, in fact, answer to the description of it in the contract, "it does not do so more or less because the defect of it is patent, or latent, or discoverable."

Sale by Sample.—A contract of sale is a contract of sale by sample when there is a term in the contract, express or implied, to that effect.

In the case of a contract of sale by sample, there is an implied condition that the bulk shall correspond with the sample in quality; and there is

an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample. There is also an implied condition that the goods shall be free from any defect rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

Evidence of usage is always admissible to prove that by a particular trade such and such a custom was the usage of that particular trade, even where no reference was made to it in the contract. Mere exhibition, however, does not make the contract necessarily a contract for sale by sample. The buyer may always reject the goods if the bulk do not correspond with the sample, unless he has finally accepted them, or the contract relates to specific goods the property in which has passed to him.

Effects of the Contract of Sale—Transfer of property as between seller and buyer.—Where there is a contract for the sale of unascertained goods, no property to the goods is transferred to the buyer unless and until the goods are ascertained.

Mere descriptive goods must always be distinguished from specific goods.

Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred at such time as the parties to the contract intend it to be transferred; and for the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.

Of course in English law, and the principle applies to Scotland also, the effect of such a contract would be, if such was the intention of the parties, to vest the property in the buyer.

Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

Rule 1.—Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.

Rule 2.—Where there is a contract for the sale of specific goods, and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing be done and the buyer has notice of it.

Rule 3.—Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done and the buyer has notice of it. [The three rules enumerated above apply only to specific goods.]

Rule 4.—When goods are delivered to the buyer on approval or "on sale or return," or other similar terms, the property in them passes to

the buyer: (*a*) when he signifies his approval or acceptance to the seller or does any other act adopting the transaction; (*b*) if he does not signify his approval or acceptance to the seller, but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time; and, if no time has been fixed, on the expiration of a reasonable time. As to what will be considered a reasonable time, this is a question of fact.

Rule 5.—When there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller, with the assent of the buyer, or by the buyer, with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made. Where, in accordance with the terms of the contract, the seller delivers the goods to the buyer or to a carrier or other person to whom they have been given for safe custody (whether named by the buyer or not), for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

If a contract of sale is made for a specific thing *in existence*, in order to vest the property, the identical goods must be sold and the price fixed; and the moment the goods which have been

selected in pursuance of the contract are delivered to a carrier, such carrier becomes the agent of the buyer, and such a delivery amounts to a delivery to the buyer; therefore, if there is a binding contract between the seller and buyer, either by note in writing or part payment, or subsequently by part acceptance, then there can be no doubt that the property passes by such delivery to the carrier. But the goods must agree with those mentioned in the contract of sale. In other words, if a tradesman orders goods to be sent by a carrier, though he does not name any particular carrier, the moment the goods are delivered to the carrier it operates as a delivery to the purchaser, and the whole property vests in him.

When there is a contract for the sale of specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such a case, notwithstanding the delivery of the goods to the buyer or to a carrier or other person having control over them for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled; and when goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller will generally be deemed to reserve the right of disposal.

When the seller of goods draws on the buyer for the price, and transmits the bill of exchange and

bill of lading to the buyer together, to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange; and if he wrongfully retains the bill of lading, the property in the goods does not pass to him.

In the case of a contract for the sale of unascertained goods, the delivery by the seller to a common carrier, or, unless the effect of the shipment is restricted by the terms of the bill of lading, shipment on board a ship of, or chartered for, the purchaser is an appropriation sufficient to pass the property. But if the seller, when shipping the articles which he intends to deliver under the contract, takes the bill of lading to his own order *and does so not as agent*, or on behalf of the purchaser, *but on his own behalf*, it must be taken from these circumstances that he reserves to himself a power of disposing of the property, and that consequently there is no final appropriation, and the property does not, on shipment, pass to the purchaser. If the seller deals with or claims to retain the bill of lading in order to secure the contract price, as when he sends forward the bill of lading with a bill of exchange attached, with directions that the bill of lading is not to be delivered to the purchaser till acceptance or payment of the bill of exchange, the appropriation is not absolute, but until acceptance of the draft, or payment or tender of the price, is conditional only, and until such acceptance or payment or tender

the property in the goods does not pass to the purchaser.

Unless otherwise agreed, the goods remain at the seller's risk until the property in them is transferred to the buyer, but when the property in them is transferred to the buyer, the goods are at the buyer's risk, whether delivery has been made or not. With this qualification, that where delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault. But nothing in Section 20 of the Sale of Goods Act, 1893, shall affect the duties or liabilities of either seller or buyer as a person who has charge of the goods of the other party.

When a seller can show that the property passed, the risk of the loss is generally in the buyer. But where the sale is a conditional one, the risk is in the seller. "It is thoroughly established that by the English law, where a bargain and sale is completed with respect to goods, and everything to be done on the part of the seller before the property should pass has been performed, then the property rests in the purchaser, although the seller still retains his lien, the price of the goods not having been paid; and any accident happening to the goods subsequently, unless it is caused by, or is the fault of, the seller—any calamity befalling after the sale is completed—must be borne by the purchaser, and by parity of reasoning, any benefit to them is his benefit, and not that of the seller." Again,

"if by the terms of the contract the seller engages to deliver the thing sold at a given place, and there be nothing to show that the thing sold was to be in the meantime at the risk of the buyer, the contract is not fulfilled by the seller unless he delivers it accordingly."

CHAPTER IV.

Transfer of title—"No man can transfer better title than he himself has"—When person precluded from denying that certain things exist—Goods sold in market overt (*i.e.* open market)—When Seller has voidable title—Stolen goods—Term "Goods": what it does not include—Person selling goods continuing in possession—Meaning of expression "Mercantile Agent"—When writ of execution in goods will bind property in goods.

Transfer of Title.—Subject to the provisions of the Sale of Goods Act, 1893, where goods are sold by a person who is not the owner of them, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller has, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell. However, nothing in the statute just mentioned (*a*) affects the provisions of the Factors Acts, *i.e.* the Factors Act (England) 1889, and the Factors Act (Scotland) 1890, or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner of them; or (*b*) the validity of any contract of sale under any special common law, or statutory power of sale, or under the order of a court of competent jurisdiction.

It may here be pointed out in reference to the

transfer of title to goods, that "no man can transfer a better title than he himself possesses."

A person is precluded from denying that a certain state of things existed where he by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position.

Where goods are sold in market overt (*ie.*, open market) according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller. But nothing in Section 22 of the Sale of Goods Act, 1893, shall affect the law relating to the sale of horses. The enactment (the 22nd Section), does not apply to Scotland. As an example of *what is market overt*, it may be mentioned that all shops in the city of London are market overt.

When the seller of goods has a voidable title to them, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith, and without notice of the seller's defect of title. If goods have come into the hands of the person who professed to sell them, that is to say, by a contract which has purported to pass the property to him from the owner of the property, then the purchaser will have a good title, even although afterwards it should appear that there were circumstances connected with that contract which would enable the original owner of the goods to reduce it and to set

it aside, because these circumstances connected with that contract, which would enable the original owner of the goods to reduce it, and to set it aside, will not be allowed to interfere with a title for valuable consideration obtained by some third party during the interval while the contract remained unreduced.

Where goods have been stolen, and the offender is prosecuted to conviction, the property in the goods so stolen revests in the person who was the owner of the goods or his personal representative, notwithstanding any intermediate dealing with them, whether by sale in market overt or otherwise. Notwithstanding any enactment to the contrary (*e.g.* Section 100 of the Larceny Act, 1861), where goods have been obtained by fraud or other wrongful means, *not amounting to larceny*, the property in such goods shall not revest in the person who was the owner of the goods, or his personal representative by reason only of the conviction of the offender. But this does not apply to Scotland.

The term "goods" does not include money. An innocent purchaser in market overt who has disposed of the goods, even with notice before conviction of the offender, is not liable to action.

Where a person, having sold goods, continues, or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition of them, to any person receiving the same in good faith and without

notice of the previous sale, shall have the same effect as if the person, making the delivery or transfer, were expressly authorised by the owner of the goods to make the same. Moreover, where a person, having bought or agreed to buy goods, obtains, with the consent of the seller, possession of the goods, or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition of them to any person receiving the same in good faith, and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person, making the delivery or transfer, were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

The term "mercantile agent" signifies a mercantile agent having, in the customary course of his business as such agent, authority either to sell goods or to consign goods for the purposes of sale, or to buy goods, or to raise money on the security of goods.

Any writ of execution against goods will bind the property in the goods of the execution debtor as from the time when the writ is delivered to the sheriff to be executed; and for the better manifestation of such time, it will be the duty of the sheriff, *without fee*, upon the receipt of any such writ, to endorse on the back of it the hour, day, month and year when he received the same. But no such writ will prejudice the title to the goods

acquired by any person in good faith and for valuable consideration, unless such person had, at the time when he acquired his title, *notice* that the writ or any other writ by virtue of which the goods of the execution debtor might be seized or attached has been delivered to and remained unexecuted in the hands of the sheriff. The signification of the term "sheriff" in Section 26 of the Sale of Goods Act, 1893, includes any officer charged with the enforcement of a writ of execution. The provisions, however, of this section of the statute just named, do not apply to Scotland.

CHAPTER V.

Performance of the Contract—Buyer refusing to accept and pay for Goods—Section 17, Statute of Frauds—Goods on board Ship—Where Seller delivers Goods less than he contracted to sell to Buyer—When Buyer not bound to accept delivery of Goods—When Seller under contract authorised or required to send Goods—Delivery of Goods to a Carrier or Wharfinger — Person who instructs Carrier, etc., on behalf of Buyer must make reasonable contract—Carrier agent of Buyer to receive Goods but not to accept them—Where Seller agrees to deliver Goods at his own risk—When Buyer deemed to have accepted Goods — Seller ready and willing to deliver Goods, and Buyer refusing to accept—Consequences.

Performance of the Contract.—It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale. "In every contract of sale there is involved a contract on the one side to accept, and on the other to deliver."

If by the terms of the contract the seller engages to deliver the thing sold at a given place, and there be nothing to show that the thing sold was to be in the meantime at the risk of the buyer, the contract is not fulfilled by the seller unless he delivers it accordingly. In a case of the goods being in the possession of a third person to take charge of, subject to charges in that behalf, there is an implied undertaking on the

part of the seller that they shall be delivered to the buyer, on his application, within a reasonable time, and readiness to pay the charges due in respect of them. A buyer of goods becomes the possessor of a right over the property by the contract of sale, although he does not acquire a right of possession to the goods until he pays or tenders the price.

Assuming that the buyer refuses to accept and pay for the goods, the seller has a right of action for damages for breach of contract, and such a right is not affected by his selling the goods to another purchaser. Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be willing to pay the price in exchange for possession of the goods.

Under Section 17 of the Statute of Frauds (now Section 4 of the Sale of Goods Act, 1893), a contract to deliver goods *without mentioning a time for payment* signifies that the delivery and the payment shall be contemporaneous acts; and where an action is brought for damages for non-delivery the plaintiff must assert readiness to accept and pay for the goods.

Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer, is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied,

the goods should be sent to his place of business, if he have one, and if not, his residence. But if the contract be for the sale of *specific* goods which, to the knowledge of the parties when the contract is made, are in some other place, then that place is the place of delivery; and where, under the contract of sale, the seller is bound to sell the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time; and where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf. But nothing in Section 29 of the Sale of Goods Act, 1893, will affect the operation or issue or transfer of any document of title to goods. Demand or tender of delivery may be treated as ineffectual, unless made at a reasonable hour. What is a reasonable hour is a question of fact. Furthermore, unless otherwise agreed, the expenses of, and incidental to, putting the goods into a deliverable state must be borne by the seller.

In the case of goods being on board ship, the endorsement and delivery of the bill operates as a symbolical delivery of the cargo. Where a thing is to be accomplished *anywhere*, a tender at a convenient time before midnight is sufficient; where the thing is to be done at a *particular* place, and where the law implies a duty on the party to whom the thing is to be done to attend, that attendance is to be by daylight, and a convenient time before

sunset; and *where personal attendance* of another is *not* necessary, transactions done in the night are good. Where the contract is silent as to time, the law implies that it is to be performed within a reasonable time, and every reasonable condition is also implied. There is no implied contract that the buyer shall pay the seller for any services in relation to the property prior to the completion of the sale by delivery.

In those cases in which the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them; but if the buyer accepts the goods so delivered, he must pay for them at the contract rate. Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered, he must pay for them at the contract rate; and where the seller delivers to the buyer the goods he contracted to sell, mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole. It must here be borne in mind that the provisions of Section 30 of the Sale of Goods Act, 1893, are subject to any usage of trade, special agreement, or course of dealing between the parties.

Unless otherwise agreed, the buyer of goods is not bound to accept delivery of them by instal-

ments; therefore, where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of, or pay for, one or more instalments, it is a question in each case depending on the terms of the contract, and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract, or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated. In other words, a person must "look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the contract of the other; you must examine what that contract is so as to see whether it amounts to a renunciation, *to an absolute refusal to perform the contract*, such as would amount to a rescission, if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part."

Assuming that a man orders a suit of clothes for a stated sum, the suit must be delivered wholly, and not *in parts*.

Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purposes of transmission to the buyer is generally deemed to be a delivery of goods to the buyer.

A delivery (the term "delivery" in Section 62 of the Sale of Goods Act, 1893, signifies voluntary transfer of possession from one person to another), of goods to a carrier or wharfinger with due care and diligence is sufficient to charge the purchaser, but he has a right to require in making this delivery, that due care and diligence shall be exercised by the seller.

Unless otherwise authorised by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable, having regard to the nature of the goods and the other circumstances of the case. If the seller omits so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages; and, unless otherwise agreed, when goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer, as may enable him to insure them during their sea transit, and if the seller fails to do so, the goods will be deemed to be at his risk during such sea transit.

Ordinarily, a carrier is the agent of the buyer to receive goods, but he is not his agent to accept them for him. In Scotch law: "In delivering goods on shipboard the seller is bound not only to charge the shipmaster or shipping company with them effectually, but, though not bound to insure, he must give such notice as to enable the

buyer to insure." It is the seller's duty to do whatever is necessary to secure the responsibility of the carriers for the safe delivery of the goods, and to put them in such a course of conveyance as that in case of a loss, the defendant might have his indemnity against the carrier.

Where the seller of goods agrees to deliver them at his own risk at a place other than that where they are when sold, the buyer must, nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit. Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them, unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract; and, unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound *on request* to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract. To put it shortly, the goods must be in conformity with the contract.

The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them. More-

over, unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them.

In the cases when the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods. But nothing in Section 37 of the Sale of Goods Act, 1893, will affect the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract.

CHAPTER VI.

Rights of Unpaid Seller against the Goods—Meaning of term "Seller" under Section 38 of Sale of Goods Act, 1893—Where Property in Goods has not passed to Buyer—Unpaid Seller's lien—Part Delivery—Termination of lien—Right of Stoppage *in transitu*—Duration of Transit—When Goods deemed to be in Course of Transit—Where Buyer or his Agent obtains Delivery of Goods—Where Carrier or other person having control acknowledges that he holds the Goods—Goods Rejected by the Buyer—Goods delivered to Ship chartered by Buyer—Carrier or other person having control Refusing to Deliver Goods—Where Part Delivery of Goods has been made to Buyer—How Stoppage *in transitu* is effected—Where Notice of Stoppage *in transitu* is given by Seller to Carrier—Effect of Sub-Sale or Pledge by Buyer—When Contract of Sale not rescinded—Where Unpaid Seller has exercised his right of lien or retention—Where Goods of a Perishable Nature—Where Seller expressly reserves the Right of re-Sale.

Rights of Unpaid Seller against the Goods.—The seller of goods is deemed to be an "unpaid seller" within the meaning of Section 38 of the Sale of Goods Act, 1893, when the whole of the price has not been paid or tendered; and when a bill of exchange, or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.

It should be noted that under Section 38 of the

Sale of Goods Act, 1893, the term "seller" includes any person who is in the position of a seller, as for instance an agent of the seller to whom the bill of lading has been endorsed, or a consignor or agent who has himself paid, or who is directly responsible for the price.

Subject to the provisions of the Sale of Goods Act, 1893, and of any statute in that behalf, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law (*a*) a right to retain the goods for the price while he is in possession of them, and (*b*) in case of the insolvency of the buyer a right to stop the goods *in transitu*, after he has parted with the possession of them, and (*c*) a right of re-sale as limited by the Sale of Goods Act, 1893.

Where the property in goods has not passed to the buyer the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights to retain and to stop them in transit where the property has passed to the buyer. In Scotland the word "retain" includes the right of retention, and the right to stoppage *in transitu* in that country is almost analagous to the English right. Furthermore, in Scotland a seller of goods may attach the same, while in his own hands, by *arrestment* (*i.e.*, attachment) or *poinding* (*i.e.*, distraining), and such arrestment or poinding will have the same operation and effect in a competition, or otherwise, as an attachment or distraining by a third party.

Unpaid Seller's Lien.—Taking into consideration the provisions of the Sale of Goods Act, 1893, the unpaid seller of goods, who is in possession of them, is entitled to retain possession of them until payment, or tender of the price in the following cases, namely: (1) where the goods have been sold without any stipulation as to credit; or, (2), where they have been sold on credit, but the term of credit has expired; or (3) where the buyer becomes insolvent.

The seller may exercise his right of lien, notwithstanding that he is in possession of the goods as agent, or person who has custody of them for the buyer. This lien does not mean charges for keeping the goods but for the *price only*. Where an unpaid seller has made part delivery of the goods he may exercise his right of lien (or retention) on the remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien (or right of retention).

If delivery is to be made by three instalments, the first instalment having been paid for on delivery, but the second instalment not being paid for on delivery, then the seller may withhold the third instalment until the second and third instalments have been paid for.

The unpaid seller of goods loses his lien, or right of retention, on them (*a*) when he delivers the goods to a carrier or other person having the custody of them for the purpose of transmission to the buyer, without reserving the right of disposal of the goods; or (*b*) when the buyer or his agent

lawfully obtains possession of the goods or (*c*) by waiver of them. The unpaid seller of goods, having a lien or right of retention on them does not lose his lien or right of retention by reason only that he has obtained judgment or decree for the price of the goods. So long as the goods remain in the warehouse of the seller, or in the hands of one who holds as his agent, his lien upon them, for the unpaid price, remains. But when once they are in the possession of an agent for the buyer, the seller parts with his lien. Moreover, an express security precludes a general lien. A seller may reserve an *express* lien, and if he does so, this excludes an *implied* one.

Stoppage in transitu.—Subject to the provisions of the Sale of Goods Act, 1893, when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them *in transitu;* that is to say, he may resume possession of the goods as long as they are in course of transit, and may retain them until payment or tender of the price. "The doctrine of stoppage *in transitu* has always been construed favourably to the seller." Strictly speaking, the term stoppage *in transitu* only applies to cases where the property in the goods has passed to the buyer. "The essence of stoppage *in transitu* is that the goods should be in the possession of a middleman."

Goods are deemed to be in course of transit from the time when they are delivered to a carrier by land or water, or other person having the control or

custody of them, for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them, from such carrier or other person having the custody of them.

If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end; and if, on the arrival of the goods at the appointed destination, the carrier or other person having the control, acknowledges to the buyer or his agent, that he holds the goods on his behalf, and continues in possession of them as the person having control for the purchaser or his agent, the transit is at an end, and it is immaterial that a further destination for the goods may have been indicated by the buyer. If the goods are rejected by the buyer, and the carrier or other person having the possession or custody continues in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back. When the goods are delivered to a ship chartered by the buyer, it is a question depending upon the circumstances of the particular case, whether they are in the possession of the master as a carrier or as agent to the buyer; and where the carrier or other person having the control refuses to deliver the goods to the buyer or his agent, the transit is deemed to be at an end. Where part delivery of the goods has been made to the buyer or his agent, the remainder of the goods may be stopped in transit, unless such part delivery has been made under such circumstances as to show an agree-

ment to give up possession of the whole of the goods. The right of stoppage *in transitu* arises by implication of law.

"When the goods have arrived at their destination, and have been delivered to the purchaser or his agent, or where the carrier holds them as warehouseman to the purchaser, and no longer as carrier only, the transit is at an end. The destination may be fixed by the contract of sale, or by directions given by the purchaser to the seller; but, however fixed, the goods have arrived at their destination, and the transit is at an end when they have got into the hands of someone who holds them for the purchaser, and for some other purpose than that of merely carrying them to the destination fixed by the contract, or by the directions given by the purchaser to the seller. The difficulty in each case lies in supplying these principles."

The unpaid seller may exercise his right of stoppage *in transitu* either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other person having the control of them in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case, the notice, *to be effectual*, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer; and when notice of stoppage *in transitu* is given by the seller to the carrier or other person in

possession of the goods, he must re-deliver the goods to, or according to the directions of, the seller. The expenses of such re-delivery must be borne by the seller.

The right of stoppage *in transitu* is not at an end when notice has been given by a principal to his agent, and no sale, even if the sale has been actually made with payment, would put an end to the right, unless there were an endorsement on a bill of lading.

Re-sale by Buyer or Seller—Subject to the provisions of the Sale of Goods Act, 1893, the unpaid seller's right of lien (or retention) is not affected by any sale or other disposition of the goods which the buyer may have made, unless the seller has assented. But where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document in good faith and for valuable consideration, then if such last-mentioned transfer was by way of sale, the unpaid seller's right of lien (or retention) or stoppage *in transitu* is defeated; and if such last-mentioned transfer was, by way of pledge or other disposition for value, the unpaid seller's right of lien, etc., can only be subject to the rights of the transferee, and subject to the provisions of Section 48 of the Sale of Goods Act, 1893. A contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien, etc.; and where an unpaid seller who has exercised his right of lien, etc., re-sells the goods, the buyer acquires a good title to them as against the original buyer.

Where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to re-sell, and the buyer does not within a reasonable time, pay or tender the price, the unpaid seller may re-sell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract.

Where the seller expressly reserves a right of re-sale in case the buyer should make default, and on the buyer making default, re-sells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim the seller may have for damages. Of course, if the purchaser is in default, he is not in immediate control of the goods, and cannot, therefore, against a wrongdoer, maintain an action for conversion.

CHAPTER VII.

Remedies of Seller—Action for Price—Where Price payable on Day certain, irrespective of Delivery—Damages for non-Acceptance—Remedies of the Buyer—Damages for non-Delivery—Measure of Damages where there is an available Market for Goods in Question—Specific Performance of contract of Sale—Remedy for Breach of Warranty—Measure of Damages for Breach of Warranty—Buyer setting up Breach of Warranty in Diminution or Extinction of Price—Exclusion of implied Terms and Conditions—Reasonable Time a Question of Fact—Rights, etc., enforceable by Action—Sales by Auction—When Sale by Auction is Complete—Payment into Court in Scotland when Breach of Warranty alleged—Interpretation of terms in Sale of Goods Act, 1893—Provisions of Factors Act, 1889.

Remedies of the Seller.—Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods; and where, under a contract of sale, the price is payable on a day certain, irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract. It is to be noted, that nothing in Sec-

tion 49 of the Sale of Goods Act, 1893, is to prejudice the right of the seller in Scotland to recover interest on the price from the date of tender of the goods, or from the date on which the price was payable, as the case may be. It must be a *wrongful* neglect or refusal to pay.

When the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance. The *general* measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract; and where there is an available market for the goods in question, the measure of damage is generally to be ascertained by the difference between the contract price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of refusal to accept.

Remedies of the Buyer.—Where the seller wrongfully, neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for non-delivery; and the general measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract. Moreover, where there is an available market for the goods in question, the measure of damages is generally to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought

to have been delivered, or if no time was fixed, then at the time of the refusal to deliver.

" When two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably, either arising naturally, *i.e.* according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed *to have been in the contemplation of both parties at the time they made the contract*, as the probable result of the breach of it. Now, if the special circumstances, under which the contract was actually made, *were communicated* by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, for such a breach of contract. For had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case, and of this advantage it would be very unjust to deprive them."

This judgment in reference to the measure of damages requires no comment, it speaks for itself.

In any action for breach of contract to deliver specific or ascertained goods, the court may, if it thinks fit, *on the application of the plaintiff*, by its judgment or decree (Scotland) direct that the contract shall be performed *specifically*, without giving the defendant the option of retaining the goods on payment of damages. Such judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price and otherwise, as the Court may deem just, and the application, by the plaintiff, may be made at any time before judgment or decree. The provisions of Section 52 of the Sale of Goods Act, 1893, will be deemed to be supplementary to, and not in derogation of the right of specific implement (Scotch) (*i.e.*, specific performance) in Scotland.

Where there is a breach of warranty by the seller, or where the buyer elects or is compelled to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not, by reason only of such breach of warranty, entitled to reject the goods, but he may (*a*) set up against the seller the breach of warranty in diminution or extinction of the price; or (*b*) maintain an action against the seller for damages for the breach of warranty; and the measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty; and in the case of a breach of warranty of quality,

such loss is generally the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty. The fact that the buyer had set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage; and nothing will prejudice or affect the buyer's right of rejection in Scotland as declared by the Sale of Goods Act, 1893. Furthermore, nothing in the Statute just mentioned, will affect the right of the buyer or the seller to recover interest or special damages in any case where by law, interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed; and this money may be recovered by ordinary action as money had and received.

Where any right, duty, or liability, would arise under a contract of sale, by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract. "Merchants are not bound to make their contracts according to any rule of law." In reference to usage, the defendant may prove the non-existence of the usage, its illegality, or unreasonableness, or that it formed no part of the agreement between the parties.

As to what constitutes a reasonable time with regard to the sale of goods, this is a question

of fact (see *ante*). Any right, duty, or liability declared by the Sale of Goods Act 1893, may be enforced by action.

Sales by Auction.—In the case of a sale by auction, where goods are put up for sale by auction in lots, each lot is generally deemed to be the subject of a separate contract of sale. A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in any other customary manner. Until such announcement is made, any bidder may retract his bid. Where a sale by auction is not notified to be subject to a right to bid on behalf of the seller, it will not be lawful for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller to any such person; and any sale contravening this rule may be treated as fraudulent by the buyer. Moreover, a sale by auction may be notified to be subject to a reserved or "upset price," (the Scotch equivalent of reserved price), and a right to bid may also be reserved expressly by, or on behalf of, the seller; and where a right to bid is expressly reserved, but not otherwise, the seller, or any one person on his behalf, may bid at the auction. Furthermore, every auctioneer, before beginning any auction, shall affix or suspend, or cause to be affixed or suspended, a ticket or board containing his full and true Christian and surname and residence, *painted*, *printed* or *written*, in large letters publicly visible and legible, in some conspicuous part of the room or place where the

auction is held, so that all persons may easily read the same, and shall also keep such ticket or board so affixed or suspended during the whole time of the auction being held; and if any auctioneer begins any auction or acts as auctioneer at any auction, in any room or place where his name and residence is not so painted or written on a ticket or board, so affixed or suspended, and kept affixed or suspended in manner stated above, he will be liable to forfeit for every such offence the sum of £20.

In Scotland, where a buyer has elected to accept goods which he might have rejected, and to treat a breach of contract as only giving rise to a claim for damages, he may, in an action by the seller for the price, be required, in the discretion of the Court before which the action depends, to consign or pay into Court the price of the goods, or part of them, or to give other reasonable security for the due payment of them.

The following Acts have been repealed, wholly or in part, by the Sale of Goods Act, 1893, namely, (1) an Act against brokers (1 Jac. 1, cap. 21) (the whole Act); (2) Sections 15 & 16 cited as 16 & 17 of the Statute of Frauds, 29 Charles II., cap. 3; (3) Section 7 of 9 Geo. IV., cap. 14 (an Act for rendering a written memorandum necessary to the validity of certain promises and engagements); (4) Sections 1-5 of the Mercantile Law Amendment (Scotland) Act, 1856, 19 & 20 Vict., cap. 60; and (5) Sections 1 & 2 of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict., cap. 97). But the repeal

of the above mentioned enactments will not affect anything done or suffered, or any right, title or interest acquired or accrued before the commencement of the Sale of Goods Act, 1893, or any legal proceeding or remedy in respect of any such thing, right, title or interest.

The rules in bankruptcy relating to contracts of sale continue to apply to them notwithstanding anything contained in the Sale of Goods Act, 1893.

The rules of the common law, including the law merchant, except in so far as they are inconsistent with the express provisions of the Act just mentioned, and, in particular, the rules relating to the law of principal and agent, and the effect of fraud, misrepresentation, duress or coercion, mistake, or other invalidating cause, continue to apply to contracts for the sale of goods; nor will anything in the Sale of Goods Act, 1893, or in any repeal effected by it, affect the enactments relating to bills of sale, or any enactment relating to the sale of goods which is not expressly repealed by the Statute of 1893; and the provisions of this Act relating to contracts of sale *do not* apply to any transactions in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security; nor *in Scotland* will anything prejudice or affect the landlord's right of hypothec (*i.e.*, a security established by law in favour of a creditor over the property of his debtor) or sequestration (*i.e.*, a "following up" of a person's property) for rent.

The following terms have by the Sale of Goods Act, 1893, special meanings, namely:—

"*Action*" includes counter-claim and set-off, and *in Scotland* condescendence and claim and compensation.

"*Buyer*" means a person who buys or agrees to buy goods.

"*Defendant*" includes *in Scotland*, defender, respondent, and claimant in a multiple-poinding.

"*Document of Title to Goods*" has the same meaning that it has in the Factors Acts (see *post*).

"*Factors Acts*" mean the Factors Act, 1889; the Factors (Scotland) Act, 1890, and any enactment amending or substituted for the same.

"*Fault*" means wrongful act or default.

"*Goods*" include all chattels personal (*i.e.*, movable goods which belong immediately to the person of the owner), other than things in action or money, and in Scotland all corporeal movables except money. The term includes industrial growing crops, etc., etc., which are attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

"*Lien in Scotland*" includes right of retention.

"*Plaintiff*" includes pursuer, complainer, claimant in a multiple-poinding, and defendant or defender counter-claiming.

"*Quality of Goods*" includes their state or condition.

"*Seller*" means a person who sells or agrees to sell goods.

"*Specific Goods*" mean goods identified and agreed upon at the time the contract of sale is made.

"*Warranty*" as regards England and Ireland means an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated. As regards Scotland, a breach of warranty will be deemed to be a failure to perform a material part of the contract.

A thing is deemed to be done in "*good faith*" when it is in fact *done honestly*, whether it be done negligently or not.

A person is deemed to be insolvent who either has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not or whether he has become a notorious or well-known bankrupt or not.

Goods are in a "*deliverable state*" when they are in such a state that the buyer would not under the contract be bound to take delivery of them.

Such is the law affecting the sale of goods under the Sale of Goods Act, 1893.

By the Factors Act, 1889 (which amends and consolidates the Factors Acts, and which are, by this Act, hereby repealed), where a mercantile agent is, with the consent of the owner, in possession of goods, or of the documents of title to goods,

any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent will, subject to the provisions of that Act, be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking, under the disposition, acts in good faith, and has not, at the time of the disposition, notice that the person making the disposition has not authority to make the same; and where a mercantile agent has, with the consent of the owner, been in possession of goods, or of the documents of title to goods, any sale, pledge, or other disposition, which would have been valid if the consent had continued, will be valid notwithstanding the determination of the consent; provided that the person taking under the disposition has not at the time notice that the consent has been determined. And where a mercantile agent has obtained possession of any document of title to goods by reason of his being, or having been, with the consent of the owner, in possession of the goods represented by them, or of any other documents of title to the goods, his possession of the first-mentioned documents shall, for the purposes of that Act, be deemed to be with the consent of the owner, which consent will be presumed in the absence of evidence to the contrary.

A pledge of documents of title to goods will be deemed to be a pledge of the goods. An agreement made through a mercantile agent's clerk will be deemed to be an agreement with the agent. The consignee has, in respect of advances

to or for the use of another person, the same lien on the goods as if such person were the owner of the goods, and may transfer such lien to another person.

In the case of dispositions by sellers and buyers of goods remaining in possession, where a person having sold goods continues in possession of the goods or of the documents of title to the goods, any sale, pledge, or other disposition of them by that person or by a mercantile agent acting for him, the transfer will have the same effect as if they had been transferred by the owner. They may, too, be disposed of by the buyer acting in good faith and without notice of any lien or other right of the original seller in respect of the goods. The effect of transfer of documents on the seller's lien, when lawfully transferred, will be that of defeating any seller's lien or right of stoppage *in transitu* as the transfer of a bill of lading has for defeating the right of stoppage *in transitu*. The mode of transferring documents in reference to sale is by delivery; but an agent cannot exceed or depart from his authority as between himself and his principal, or exempt him from any liability, civil or criminal, for so doing; and he may recover the goods from his agent or trustee in bankruptcy at any time before the sale or pledge of them. Furthermore, nothing in the Factors Act, 1889, will prevent the owner of goods sold by an agent from recovering from the buyer the price agreed to be paid for the same subject to any right of set-off on the part of the buyer against the agent.

The Factors Act, 1889, does *not* extend to Scotland.

In reference to the ancient statutes 31 Eliz., cap. 12 ("an Act to avoid horse stealing") and 2 & 3 Philip & Mary, cap. 7 ("an Act against the buying of stolen horses") notice has only incidentally been made.

FINIS.

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